No. 94-197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ELOISE ANDERSON, individually and in her official capacity as Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; and RUSSELL S. GOULD, Director, California Department of Finance,

Petitioners,

—v.—

DESHAWN GREEN; DEBBY VENTURELLA; and DIANA P. BERTOLLT, on behalf of themselves and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL WELFARE RIGHTS AND REFORM UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the National Welfare Rights and Reform Union (NWR&RU) respectfully submits this brief amicus curiae in support of Respondents.

Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been filed with the Clerk of this Court.

NWR&RU is a national association of low income groups that advocates for a just and humane welfare system. Each member organization of NWR&RU is comprised of current or former welfare recipients and other low income individuals. Volunteers from these groups serve as officers of and advisors to the national organization.

NWR&RU's interest in this case stems from its opposition to welfare policies, in California and elsewhere, that discriminate against new residents. NWR&RU believes that such discrimination makes its members and other poor people second class citizens by threatening their ability to exercise their constitutional right to migrate freely between states.

STATEMENT OF THE CASE

This case is a constitutional challenge to California Welfare and Institutions Code § 11450.03 (the "Statute"). This Statute reduces the level of Aid to Families with Dependent Children (AFDC) benefits for new California residents during their first year in California to the level in their state of prior residence.

The AFDC Program

AFDC is the national welfare program for needy families with children which was established by the Social Security Act of 1935. Although not required to participate, all states have chosen to establish AFDC programs. The federal government reimburses each state at least 50% of

the amount expended for benefits and administration under the state's program. In return for the federal funds, a state must operate its AFDC program in accordance with the requirements of the AFDC statute, 42 U.S.C. §§ 601-87, and the implementing regulations of the federal Department of Health and Human Services (HHS), which supervises and regulates state AFDC administration.

The monthly benefit level for an eligible family is established by the state in which the family resides. For a family of three, the average family size,[1] the monthly benefit level in the contiguous states in January 1994 ranged from the low of $120 in Mississippi to the high of $703 in New York State's Suffolk County, with a median of $366.[2] *Overview*, *supra* at 366-67.

In California, the maximum payment for a family of three was $607 in January 1994. This amount was higher than the typical benefit level in all but four states. In thirteen states the benefit level was less than half of the California amount, and in six states less than a third of the California amount. *Id.*

Most AFDC recipients qualify for a nutritional supplement from the Food Stamp program, a program which provides food coupons to those with a cash income which

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[1] Three quarters of AFDC families include one or two children and the average family size is 2.9. Staff of House Comm. on Ways and Means, 103d Cong., 2d Sess., *Overview of Entitlement Programs*, 401 (Comm. Print 1994) [hereinafter, *Overview*].

[2] In New York State the benefit level varies by region, with $577 the level in New York City. *Overview*, *supra* at 366.

federal standards deem insufficient for nutritional adequacy.[3] In January 1994, the combined benefit from AFDC and Food Stamps was below the poverty level in all of the contiguous states. *Id.* at 366-67.

Recent AFDC Caseload Growth And Benefit Level Cuts

The national AFDC caseload grew only slowly from 1982 to 1988, but from 1989 to 1993 the average monthly number of cases increased 32% to five million cases, about 5.5% of the national population. *Overview*, *supra* at 395. All but two states experienced some increase from 1989 to 1993, and in many states the increases were very large, with the caseloads actually more than doubling in two states. In California the caseload increased 42%. *Compare* HHS, Family Support Administration, *Characteristics and Financial Circumstances of AFDC Recipients: FY 1989* 19 *with* HHS, Administration for Children and Families, *Overview of the AFDC Program, Fiscal Year 1993* 6. This rapid growth apparently resulted largely from the combined effect of the 1990-91 recession and an increase in the number of single parent families.[4] The rapid growth now ap-

[3] The maximum food coupon allotment, $295 for a family of three in the contiguous states in fiscal year 1994, *Overview*, *supra* at 769, is generally reduced $.30 for $1.00 of countable income, including AFDC benefits, because the program's rules treat thirty cents of each countable dollar as available for food. Some families receiving AFDC who are sharing housing with others do not qualify for the Food Stamp program.

[4] According to a Congressional Budget Office analysis, the strong economy during 1983-88 in large part counteracted demographic factors that would have otherwise been expected to increase AFDC caseloads, while the weakness of the economy leading up to, during, and after the 1990-91 recession worked in tandem with demographic factors to create large increases in caseloads. Congressional Budget Office, Staff Memo- (continued...)

pears to be over.[5]

As caseloads increased, many states froze AFDC benefit levels and California and several other states cut them. Nationwide, between 1989 and 1993 the average monthly benefit payment per family fell 15% in constant 1993 dollars. *Overview*, *supra* at 378. In California, the $694 maximum payment for a family of three in January 1990 was cut several times, and by January 1994 had been reduced to $607. *Id.* at 375.

Due to benefit cuts, the percentage increase in real AFDC expenditures from 1989 to 1993 was far less than the percentage increase in the caseload. In constant 1993 dollars, the $25.2 billion national AFDC expenditure in 1993 was 10% higher than in 1989, and the $5.9 billion state and federal expenditure on AFDC benefits in California in 1993 was 13% higher than in 1989. *Overview, supra* at 389, 396, 1213. The $13.8 billion federal AFDC expenditure was about 1% of the $1.4 trillion total federal spending in 1993. *Overview*, *supra* at 389, 1271. Total state spending for AFDC benefits, including federal funds spent by the States, was expected to be 3.4% of all state spending in 1993. National Association of State Budget Officers, *1993 State Expenditure Report* 79 (March 1994).

[4] (...continued)
randum, *Forecasting AFDC Caseloads with an Emphasis on Economic Factors*, 4, 18 (July 1993).

[5] The AFDC growth rate dropped sharply by the first quarter of 1993. *Id.* 1. Earlier this year HHS projected that the caseload would increase a total of 10% between 1994 and 1999. *Overview*, *supra* at 395.

Recent Attempts By California And Other States To Reduce AFDC Benefits For New Residents

The California Statute challenged in this case was enacted in 1992, and later that year California began implementation after requesting and receiving from HHS waivers of federal AFDC requirements which would otherwise block the Statute's implementation.[6] The district court held the Statute unconstitutional, *Green v. Anderson*, 811 F.Supp. 516 (E.D. Cal. 1993), and the Court of Appeals summarily affirmed, *Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994).

California is but one of five states that in the period of rapid caseload growth in the early 1990's requested waivers to allow reductions in AFDC benefits for new state residents during their first year of residence to the level in their state of prior residence.[7]

Wisconsin enacted its multi-tier benefit level scheme in 1991 and in July 1992 received HHS permission to operate the scheme in selected counties. A constitutional challenge is pending. *V.C. v. Whitburn*, Civil Action No. 94-C-1028 (E.D. Wis. filed Sept. 13, 1994). Illinois, Iowa, and Wyoming all applied to HHS in 1992 or 1993 for waivers to

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[6] Section 1115(a) of the Social Security Act, 42 U.S.C. § 1315(a), provides that the Secretary of HHS may waive a state's compliance with various provisions of the Act, "to the extent and for the period he finds necessary to enable such State . . . to carry out" an "experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of" the Act.

[7] The other four states are Wisconsin, Illinois, Iowa, and Wyoming. The texts of the statutes in Wisconsin, Illinois, and Iowa are set out in the Appendix. There is no statute in Wyoming providing specific authorization.

implement similar multi-tier schemes. After the district court's decision in this case, Iowa withdrew its request, and HHS denied the Illinois request on August 3, 1993, and the Wyoming request on September 1, 1993,[8] citing the questionable constitutionality of the provisions, and stating that it would not authorize additional multi-tier schemes "[u]ntil the matter is resolved".[9]

If this "matter is resolved" by this Court finding the California Statute constitutional, additional states will likely seek to reduce AFDC benefits for newer residents, if not deny them totally. Some might seek to limit benefits for periods longer than twelve months.

It is impossible to be sure how many families' benefits could be affected if limitations on benefits for newer residents again became widespread in AFDC. There is uncertainty about the form such limitations might take, and insufficient data on length of residence prior to AFDC application. However, some evidence suggests that approximately 80,000 families a year have resided in their state less than twelve months prior to the opening of their AFDC case. A recent study estimates that 77,000 women moved to another state and received AFDC in 1988. Russell L. Hanson and John T. Hartman, *Do Welfare Magnets Attract?* University of Wisconsin, Institute for Research on Poverty, Discussion

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[8] *See* HHS, Administration for Children and Families, *Welfare Reform: Section 1115 Waiver Authority* (November 14, 1994).

[9] In a letter dated July 30, 1993, to the State of Illinois, Laurence J. Love, Acting Assistant Secretary for Children and Families, HHS, stated, "Serious issues regarding the constitutionality of this provision have arisen, and are currently being litigated. Until the matter is resolved, we are not authorizing further research in this area." This letter has been lodged with the Clerk of this Court, in a set of materials regarding state waiver applications.

Paper No. 1028-94 at 20 (February 1994). A similar estimate of 79,000 such families results if one assumes the same annual rate of interstate migration for eligible AFDC applicants as for single mother families generally.[10]

SUMMARY OF THE ARGUMENT

The Constitution guarantees to all Americans the right to travel to and settle in their state of choice. The California Statute suffers from the same constitutional infirmity as the statutes this Court struck down in *Shapiro v. Thompson*, 394 U.S. 618 (1969), because it denies new residents "the very means to subsist" which the State provides to longer term residents.

A state may not attempt to prevent needy families from settling in the state. The record demonstrates that this is the primary objective of the California Statute. Moreover, the experience in other states demonstrates that this is always the aim of AFDC statutes which discriminate against new residents.

California raises the specter of waves of indigent newcomers traveling to California to take advantage of its welfare benefits and suggests that this is somehow relevant to this Court's legal analysis. States, however, may not

[10] The most recent relevant Census Bureau report indicates that 3.3% of single mother families had moved between states within the last twelve months when surveyed in 1991. U.S. Department of Commerce, Bureau of the Census, No. P20-473, *Geographical Mobility: March 1991 to March 1992*, 29 (1993). 2.4 million AFDC cases were opened in 1993. HHS, Office of Family Assistance, *Quarterly Report on State-Reported Data on Aid to Families with Dependent Children* 95 (May 1994).

lawfully attempt to discourage migration of that subset of newcomers who seek public support. In any case, recent studies contradict the claim that above average AFDC benefits have a strong effect on interstate migration.

Because the purpose of the California Statute is to deter migration between states and because it draws a distinction which penalizes and deters interstate travel, it is subject to strict scrutiny and could be justified only by a compelling state interest. The only permissible interest asserted by the State--saving money--is not compelling. Even if the Statute were not subject to strict scrutiny, it would be unconstitutional under a rational basis test.

ARGUMENT

I. THE FREEDOM TO TRAVEL IS A FUNDAMENTAL RIGHT AND THIS COURT'S DECISION IN *SHAPIRO V. THOMPSON* COMPELS THE CONCLUSION THAT THE CALIFORNIA STATUTE IS UNCONSTITUTIONAL

A. Plaintiffs' Freedom To Move To California Is Protected As A Fundamental Constitutional Right.

It has long been established that the Constitution protects the right of every citizen to travel freely from state to state and to settle in the state of his or her choosing. *See, e.g., United States v. Guest*, 383 U.S. 745, 757 (1966) (The right to travel from state to state "occupies a position fundamental to the concept of our Federal Union."); *Kent v. Dulles*, 357 U.S. 116, 126 (1958); *Baldwin v. Seelig*, 294 U.S. 511, 523 (1935); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48-49 (1867).

The fundamental nature of the freedom to travel under our Constitution is matched by the central importance internal migration has had in the actual lives of Americans since the country's earliest days. Alexis de Tocqueville, writing in 1834, noted the American propensity to move onward:

> [I]n the United States a man builds a house in which to spend his old age, and he sells it before the roof is on; he plants a garden and lets it just as the trees are coming into bearing; he brings a field into tillage and leaves other men to gather the crops; he settles in a place, which he soon afterwards leaves to carry his changeable longings elsewhere. . . .

de Tocqueville, *Democracy in America*, vol. 2 (Vintage Books 1945 [1834]) 144-45.

Today mobility continues its central importance. More than seven million Americans, 3% of the population, change their state of residence each year. U.S. Department of Commerce, Bureau of the Census, *Geographical Mobility: March 1991 to March 1992*, Report No. P20-473 at VIII (November 1993). Nearly one-third of native born Americans of all ages were residing outside of their state of birth at the time of the 1980 census. Larry Long, *Migration and Residential Mobility in the United States* 29 (National Committee for Research on the 1980 Census 1988). Children born today can be expected to move from one state to another an average of 1.71 times over their lifetime. *Id.* at 302.

The families whose rights are at issue before this Court have therefore done exactly what millions of Americans have done throughout our history: they have moved in search of a better environment for themselves and their

children, new economic opportunities, and the chance to create a new life in a new place. In so doing they are exercising a basic right protected by the Constitution.

B. The California Statute Is Indistinguishable Under The Constitution From The Statutes Held Unconstitutional In *Shapiro v. Thompson*.

This Court has already definitively settled the question presented to it in this case. When a state statute penalizes the exercise of the right to travel by denying new residents for a period of one year a welfare benefit that provides the "necessities of life," *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 259 (1974) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969)), it is unconstitutional. The Court's cases identify at least two welfare benefits that provide "necessities of life": AFDC (*Shapiro*) and medical care (*Memorial Hospital*). The lone dissenter in *Memorial Hospital* also acknowledged that the denial of AFDC benefits amounts to a "virtual denial of entry" because they provide "'the very means by which to live.'" 415 U.S. at 285 (Rehnquist, J., dissenting) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970)).

In *Shapiro*, this Court held that the Constitution forbids states to deny to new residents the AFDC benefits that are provided to longer term residents. California attempts to distinguish its Statute from the statutes struck down in *Shapiro* by claiming that its Statute is different because, rather than completely denying AFDC benefits to new residents, it only reduces the benefits available to them. This attempt is unsuccessful.

First, it is not true that all of the statutes at issue in *Shapiro* completely denied benefits to new residents. Connecticut and Pennsylvania provided "temporary, partial

assistance . . . to some new residents." *Shapiro*, 394 U.S. at 635. Second, the controlling factor in *Shapiro* was not whether the denial of assistance was total; it was whether the denial deprived families of benefits needed "to obtain the very means to subsist--food, shelter, and other necessities of life." 394 U.S. at 627. There can be no doubt that by providing Plaintiffs with grants that are hundreds of dollars less per month than the already parsimonious full California grant the State is denying these families "the very means to subsist."

Thus, *Shapiro* controls this case and the California Statute should be held unconstitutional.

II. THE CALIFORNIA STATUTE HAS THE IMPERMISSIBLE OBJECTIVE OF DETERRING POOR FAMILIES FROM SETTLING IN THE STATE

A. This Court's Precedents Establish That A State Cannot Lawfully Attempt To Prevent Poor People From Settling In The State.

Laws which seek to inhibit interstate migration are virtually per se unconstitutional. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (plurality), 920-22 (dissent) (1986); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 620 n.9 (1985); *Zobel v. Williams*, 457 U.S. 55, 62 n.9 (1982); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 264 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969); *See also Edwards v. California*, 314 U.S. 160 (1941).

The objective of deterring settlement in the state is no less invidious when it is poor people the state seeks to exclude. In *Edwards*, *supra*, Justice Douglas, joined by

Justices Black and Murphy in concurrence, explained why a state cannot single out and exclude the poor and needy:

> [T]o allow such an exception to be grafted on the rights of *national* citizenship would be to contravene every conception of national unity. It would also be to introduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who were stigmatized by a State as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. It would prevent a citizen because he was poor from seeking new horizons in other States. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity.

314 U.S. at 181 (emphasis in original). *See also id.* at 185 (Jackson, J., concurring).

The principle that a state cannot erect purposeful barriers to the settlement of poor people of course extends to those who may need public assistance, as this Court affirmed in *Shapiro*:

> We do not doubt that the one-year waiting period device is well suited to discourage the influx of poor families in need of assistance. . . . But the purpose of inhibiting migration by needy persons into the state is constitutionally impermissible.

394 U.S. at 629-30. *See also Memorial Hospital*, 415 U.S. at 263-64.

Some amici suggest that deterring those who seek

higher AFDC benefits is a permissible purpose.[11] However, the Court has already rejected this notion:

> . . . a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. . . . [W]e do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a State's public assistance.

Shapiro, 394 U.S. at 631.

This principle was reiterated in *Memorial Hospital*, which added:

> An indigent who considers the quality of public hospital facilities in entering the State is no less deserving than one who moves into the State in order to take advantage of its better educational facilities.

415 U.S. at 264. In dissent, then-Justice Rehnquist also acknowledged that an "effective and purposeful attempt to insulate the State from indigents" is constitutionally infirm. *Id.* at 283 (Rehnquist, J., dissenting).

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[11] *See* Brief amicus curiae of the Mountain States Legal Foundation et al. 5-6; Brief amicus curiae of the Pacific Legal Foundation 5. California acknowledges that a purposeful attempt to exclude indigent newcomers would be unconstitutional, but raises the specter of waves of indigents traveling into California to take advantage of the State's welfare benefits and suggests that this is relevant to this Court's legal analysis. Petitioners' Brief on the Merits 21. The four state amici make a similar argument. Brief amicus curiae of Minnesota et al. 9.

Moreover, even if the objective of deterring migration by those who might seek a higher welfare grant were permissible, it could not justify the California Statute because the Statute irrationally treats all families who need AFDC in their first year of residence as if they came to the State to obtain a higher AFDC grant. Just as in *Shapiro*,

> [T]he class of barred newcomers is all-inclusive, lumping the great majority who come to the state for other purposes with those who come for the sole purpose of collecting higher benefits. In actual operation, therefore, the three statutes enact what are in effect nonrebuttable presumptions. . . .

394 U.S. at 631. One need only look to the record in this case to conclude that this presumption is insupportable.[12]

B. The Undeniable Objective Of The California Statute Is To Deter Settlement Of Poor People In The State.

The California Statute denies benefits to families equally needy, equally qualified and otherwise identically situated to those who receive full aid save in one respect: they have recently left one state and settled in another. As the district court observed, by providing for lower benefits for newcomers the statute's very structure suggests a goal of deterrence. *See Green*, 811 F.Supp. at 522 n.14.

That the Statute varies the amount of the reduction for newer residents based on the benefit in their prior state of residence further evidences its inherent aim to deter. A multi-tier scheme of variably reduced benefits based on prior state of residence can have no other objective. In-

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[12] Each of the Plaintiffs left her prior state of residence to escape abuse, and went to California where she had family. JA 71-72, 75, 78.

deed, neither the State nor any of the amici supporting the State has even been able to suggest an objective that explains the Statute's variable reduction feature.

The record in this case is replete with evidence that the Statute was passed in order to discourage poor families from settling in California. *See, e.g.*, JA at 20, 24, 31-42, 44, 48, 50, 61, 99, 100-01. Despite its circumlocution, the State's claim that the Statute merely "removes California's relatively high AFDC benefit levels, for a period of one year, as one of the factors a person might consider when contemplating a move to California," Pet. Br. at 21, implicitly admits this purpose. It is contemplated that some people will consider that the full AFDC benefit is not available to them due to the Statute and as a result choose not to move to California.

C. Experience In Other States Further Evidences That The Aim Of The Statute And Others Like It Is Always To Deter Migration.

In recent years, Wisconsin, Illinois, Iowa, and Wyoming have also implemented or sought to implement multi-tier schemes reducing AFDC benefits for new residents to the level in the state from which they came.[13] *See* State-

[13] As noted in the Statement of the Case, after the district court decision in this case, HHS denied Illinois' and Wyoming's waiver requests citing the questionable constitutionality of the provisions, and Iowa withdrew its request. In recent years, Minnesota, New York, Pennsylvania, and Wisconsin have enacted durational requirements for newcomers in their General Assistance (GA) programs. Each state provision faced or is currently facing court challenge. *See Warrick v. Snider*, Civil Action No. 94-1634 (W.D. Pa. amended complaint filed Sept. 30, 1994); *Mitchell v. Steffen*, 504 N.W.2d 198 (Minn. 1993), *aff'g* 487 N.W.2d 896 (Minn. Ct. App. 1992), *cert. denied*, 114 S.Ct. 902 (continued...)

ment of the Case, *supra* p. 6. The legislative and administrative history of the provisions in these states provides further support for the conclusion that the purpose of multi-tier schemes is always to deter poor people from migrating to the state.

The Wisconsin statute expressly provides that the evaluation of its scheme shall determine "whether the demonstration project deters persons from moving to this state." Wis. Stat. § 49.19(11m)(e). Wisconsin's waiver application introduces its subject matter with a lengthy excerpt from a speech by Governor Wilson of California, condemning the "exploding" growth in welfare spending in that state and attributing it to newly arrived welfare recipients. Wisconsin Department of Health and Social Services, Application for Federal Assistance: "Two-Tier AFDC Benefit Demonstration Project" 2-3 (June 26, 1992).[14] Wisconsin is portrayed as facing a similar crisis. The proposal for a multi-tier scheme in selected parts of the state is based upon the "intuitive conclusion that the differential in benefits is inducing families to move to Wisconsin in search of higher benefits." *Id.* at 5. The first "hypothesis" of the project is that,

> [I]n counties where the two-tiered policy is implemented, there will be a reduction in the percentage of new AFDC recipients who previously resided in

[13] (...continued)
(1994); *Aumick v. Bane*, Index No. 2881/93 (N.Y. Sup. Ct. 1994); *Jones v. Milwaukee County*, 485 N.W.2d 21 (Wis. 1992).

[14] Ten copies of a packet of materials regarding state waiver applications have been lodged with the Clerk of this Court. The packet contains copies of the Wisconsin, Illinois, Iowa and Wyoming waiver applications and related materials.

> a state other than Wisconsin, when compared to the non-demonstration counties for the same time period. . . .

Id. at 26. This "hypothesis" reveals the project's objective: to generate the projected effect by deterring migration.

The waiver applications of Illinois, Iowa, and Wyoming each describe the purpose in seeking to implement a multi-tier scheme as being to "reduce the incentive" for families to move to the state.

Illinois' waiver application hypothesized that its scheme would result in "a lower percentage of the Illinois AFDC caseload that received AFDC from other states in the year prior to moving to Illinois" and a resulting "savings." Illinois Department of Public Aid, Application for Federal Assistance: "Relocation to Illinois Project" 7 (October 1, 1992). The sponsor of the provision in the Illinois legislature agreed that the measure was aimed at preventing the State from "becoming a welfare magnet." *Transcription Debate*, State of Illinois, 87th General Assembly, House of Representatives, 167th Legislative Day at 6 (July 30, 1992). Another legislator questioned the measure's constitutionality, but supported its objective: "while . . . it seems to make sense that we should try to prohibit people from other states coming into Illinois to get larger benefits, it appears very clear that this is unconstitutional." *Id.* at 1.

Iowa's waiver application bluntly declared that: "The [multi-tier] proposal would reduce the incentive for families to move to Iowa for the purpose of receiving Iowa's higher public assistance grants." Iowa Department of Human Services, Application for Federal Assistance: "Iowa Family Investment Program" 75 (April 17, 1993). One state legislator explained, "With all the empty houses in southern

Iowa, many out-of-state recipients move to Iowa to get the higher rate." *Mail Call*, Sumner Gazette, October 8, 1992 (Letter from Ray Lageschulte, Iowa State Representative).

Wyoming's waiver application announced that the purpose of the multi-tier benefit scheme was to "reduce the incentive for families to move to Wyoming to receive public assistance." Wyoming Department of Family Services, Application for Federal Assistance: "Wyoming Relocation Grant" 1 (December 24, 1992). The State continued:

> This project would demonstrate the effectiveness of a proposal which is intended to discourage clients to move to Wyoming for a higher public assistance grant.

Id. Throughout its application Wyoming speaks of "reducing the incentive" to migrate, and "discouraging" migration, interchangeably as project goals.

No state has yet evidenced a purpose for a multi-tier AFDC durational residency statute other than to achieve the goal that is self-evident from the structure of the provisions: to deter in-migration by needy families.

III. RECENT STUDIES CONTRADICT THE "WELFARE MAGNET" HYPOTHESIS

California and the four State amici suggest that social science research has established that large numbers of families migrate from one state to another to increase their AFDC benefits. They also suggest that this Court should depart from its holding in *Shapiro* on the ground that durational residency requirements are necessary to protect state budgets from an influx of new indigent residents seeking

higher welfare benefits. Pet. Br. at 21, Minnesota et. al. Br. at 9. There is no basis for these claims.

California and amici cite but one study in support of this "welfare magnet" thesis, Paul E. Peterson and Mark C. Rom, *Welfare Magnets* (1990).[15] That study analyzed poverty rates, not migration rates, and found that poverty rates tended to rise over time in states with above-average AFDC benefit levels. Based on these findings, the authors claimed "proof" that AFDC benefits had a magnetic effect.

This logic is flawed. Changes in state poverty rates (number poor/total population) can be due to any number of factors, and may have nothing whatsoever to do with interstate migration. As a recent study of the "welfare magnet" issue explained:

> Peterson and Rom do not actually show that poor people migrate to high benefit states, let alone that migrants move in order to receive better benefits. Indeed, they cannot, given their reliance on aggregate data . . . . The logical pitfalls of this approach are obvious. The same outcome could be the result of any number of decision-making processes, some of them not even involving the behavior of poor people.

Russell L. Hanson and John T. Hartman, *Do Welfare Magnets Attract?* University of Wisconsin, Institute for Research on Poverty, Discussion Paper No. 1028-94 at 5 (February 1994).[16]

[15] California suggests that Peterson and Rom at page 58 credit two earlier studies with having shown that "the effect of welfare benefits on migration is strong and significant." Pet. Br. at 21. In fact, Peterson and Rom at page 58 criticize those earlier studies and conclude that "each study has limitations that leaves the issue unresolved". The two 1994 studies discussed below in this brief also criticized both of those earlier studies.

This same study analyzes Census Bureau data on interstate migration by low income women and finds no evidence of "welfare magnets":

> The Current Population Surveys supply a firm foundation for gauging the magnetic effects of high welfare benefits, and our results show that policymakers' fear of being overrun by poor migrants are groundless. We find no evidence that poor women are attracted to high benefit states by the possibility of receiving more assistance. . . . [T]he welfare magnet hypothesis is not sustained by data on the behavior of poor individuals. . . . Consequently, state policymakers' efforts to restrict access to welfare are unnecessary (and unnecessarily harmful to those whose subsistence depends on welfare).

Hanson and Hartman, *supra* at 26. Hanson and Hartman also estimate that 77,000 low income women moved to

[16] Another recent study of the welfare magnet issue is similarly critical: "Indeed, the standards of evidence have been so low that it is common practice for studies to find 'evidence' of welfare magnets without using data on migration rates (e.g. Peterson and Rom [1990])!" James R. Walker, *Migration Among Low-Income Households: Helping the Witch Doctors Reach Consensus*, University of Wisconsin, Institute for Research on Poverty, Discussion Paper No. 1031-94 at 1 (April 1994). A summary overview of "welfare magnet" studies, written after Peterson and Rom but before the two 1994 studies discussed in this brief, said "the available research has proven inconclusive." Robert Moffitt, *Welfare Reform: An Economist's Perspective*, 11 Yale Law and Policy Review 126, 137 (1993).

another state and received AFDC in 1988.[17] *Id.* at 20. This figure includes those who moved to states where benefits were lower, and is a minute fraction of the total AFDC caseload.

A second recent study reaches a conclusion similar to Hanson and Hartman:

> The data offer no compelling evidence in support of the welfare magnet hypothesis. Migration propensities are as likely to invalidate as they are to support the welfare magnet hypothesis. Moreover, none of the estimated effects of welfare benefits are statistically significant at conventional levels.

Walker, *supra* at 47-48.

The conclusion that above average AFDC benefit levels have no large attractive effect on interstate migration is consistent with the Census Bureau data on regional migration patterns for the poor and non-poor between the late 1960's and the mid 1980's.[18] Poor people migrated in the same general directions as the rest of the population. Just as for the rest of the population, the net migration of poor people was out of the "rustbelt" - the Northeast and the Midwest - and into the "sunbelt" - the South and the West.

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[17] Hanson and Hartman found that 0.7% of the low income women of child bearing age sampled in the Census Bureau's annual Current Population Surveys from 1982-84 and from 1986-88 had moved to another state and received AFDC in the twelve months preceding the survey. They then applied this percentage to the total number of poor women of child bearing age in 1988, to derive the figure of 77,000.

[18] The Census Bureau annual mobility reports ceased providing data on movers classified by poor/nonpoor status after the report for March 1986 to March 1987.

See Larry Long, *Migration and Residential Mobility in the United States* 159-62 (National Committee for Research on the 1980 Census 1988).

The migration of poor people into the South is particularly noteworthy. Almost all of the seventeen states which the Census Bureau classifies as the "South" have traditionally had below average benefit levels.[19] For example, in January 1994 these seventeen states included the ten states with the lowest AFDC benefits for a family of three, and only two states where the benefit was above the median. *Overview, supra* at 375-77. One would not expect this pattern of migration if the "welfare magnet" hypothesis were valid.

IV. THE CALIFORNIA STATUTE FAILS BOTH THE APPLICABLE STRICT SCRUTINY TEST AND A RATIONAL BASIS ANALYSIS

A. The Statute Is Subject To Strict Scrutiny.

A statute which treats new residents disparately is subject to strict scrutiny when it "[1] actually deters travel . . . [2] when impeding travel is its primary objective . . . or [3] when it uses any classification which serves to penalize the exercise of that right." *Soto-Lopez*, 476 U.S. at 903 (citations and internal quotations omitted); *accord id.* at 920-21 (dissent). *See Memorial Hospital*, 425 U.S. at 256-

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[19] The Census Bureau "South" includes: Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. U.S. Department of Commerce, Bureau of the Census, No. P20-473, *Geographical Mobility: March 1991 to March 1992* A-2 (1993).

58; *Shapiro*, 394 U.S at 634; *see also id.* at 643-44 (Stewart, J. concurring) (Whenever an intent of a statute is to deter migration, "any *other* purposes offered in support [of the statute] . . . must be shown to reflect a *compelling* governmental interest.") (emphasis in the original).

In this case, the Statute penalizes the right to travel, as demonstrated in Section I, *supra*, by denying new residents "the very means to subsist" which are provided to other residents, and its objective, as shown in Section II, *supra*, is to deter poor families from migrating to California. Furthermore, it cannot seriously be doubted that, if allowed to enforce the Statute, California will succeed in deterring from moving to and settling in the State some families who will fear being forced into destitution and homelessness by the Statute if they should need AFDC during their first year of residence. Thus, because any of these factors triggers strict scrutiny, the California statute is unconstitutional unless it can be justified by a compelling state interest.

B. Paying Lower Benefits To New Residents Serves No Compelling State Interest.

The only permissible interest asserted by California as justifying its Statute is an interest in cutting its welfare costs.[20] This Court has repeatedly held that a state's interest in protecting the public fisc, while legitimate, is not compelling. In *Shapiro*, the Court recognized that "a state

[20] California alludes to the Statute's status as part of an AFDC demonstration project and asserts that studying the effects of the Statute would provide useful information for future policy decisions. Pet. Br. at 18-19. Because the aim the experiment seeks to achieve--deterring poor people from settling in California--is constitutionally impermissible, the assertion that it would produce useful data does not provide a legitimate purpose for the statute.

has a valid interest in preserving the fiscal integrity of its programs," yet held that:

> [A] state may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . [A]ppellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.

394 U.S. at 633 (footnote omitted). *Accord Memorial Hospital*, 415 U.S. at 263.

C. The Statute Fails Even A Rational Basis Test.

Although the Court's precedents dictate the application of the strict scrutiny analysis of *Shapiro* and its progeny in this case, the conclusion that California's statute is unconstitutional would be inescapable even under the least restrictive test employed under the Equal Protection Clause, which asks whether a distinction between new and established residents "rationally furthers a legitimate state purpose." *Zobel v. Williams*, 457 U.S. 55, 60 (1982). As four Justices concurring in *Zobel* pointed out, the "instances in which length of residence could provide a legitimate basis for distinguishing one citizen from another are rare." 457 U.S. at 70 (Brennan, J., concurring). On more than one occasion, this Court has found that state distinctions between new and other residents were unconstitutional because they failed even this minimal test. *Hooper v. Bernalillo County*, 472 U.S. 612 (1985); *Zobel, supra*; *see also Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 912 (1986) (Burger, C.J., concurring).

California claims that its interest in reducing welfare costs is sufficient to justify the disparate treatment of new

and longer term residents in its Statute. Pet. Br. at 18-23. Even under a rational basis test, however, California must do more than demonstrate the obvious proposition that reducing benefits to a group of its citizens reduces its overall welfare spending. It must explain why it is rational to place the burden of cutting welfare costs disproportionately on new residents. *See Hooper*, 472 U.S. at 621; *Zobel*, 457 U.S. at 61-62; *Shapiro*, 394 U.S. at 637-38 (Because there is no reason that the purpose should not apply equally to longer term residents, "[a] state purpose to encourage employment provides no rational basis for imposing a one-year waiting-period restriction on new residents only.") California makes no effort to provide a rationale for disproportionately burdening new residents.

The Washington Legal Foundation, et al., attempt to supply the missing rationale by asserting that new residents are better able to adjust to lower benefit levels than longer term residents and that longer term residents have a reliance interest in a particular level of AFDC benefits that new residents do not have. Brief amicus curiae of the Washington Legal Foundation et al. (WLF Br.) at 9-12. Neither of these post hoc, third-party rationales withstands analysis. Furthermore, the fact that new residents are not the cause of the recent increase in California's AFDC caseload further highlights the irrationality of singling them out to bear a disproportionate share of California's welfare cuts.

1. The Needs Of New Residents Are No Less Than Those Of Others.

The assertion that new residents need less defies both common sense and available evidence regarding the relative costs of living of newcomers and more established residents. As anyone who has ever moved is well aware, there are unavoidable costs associated with moving and establishing a new residence that those who do not move do not incur. These typically include at a minimum payment of security deposits and hook up costs for telephones and other utilities. Newcomers like the Plaintiffs who are fleeing abusive relationships may arrive in their new state with little more than the clothes on their backs, and may therefore have substantial additional costs for new furniture and clothing for themselves and their children. Furthermore, new renters generally pay significantly higher rents than renters who are already in place. *See* U.S. Department of Commerce, Bureau of the Census, *Metropolitan Housing Characteristics (1990 CH-3-1)* 5 (December 1993).

The Washington Legal Foundation, et al., claim that newcomers are better able to "adjust to cuts through their choice of communities and lifestyles." WLF Br. at 10. Again, the Plaintiffs provide instructive examples of why this is not so. Each moved to California to be close to relatives who they hoped could provide them with emotional support and protection from the abusive partners they were fleeing. JA 71, 75, 80. There is no reason to believe that the Plaintiffs know others in California who could play the same role for them.

Even if it were possible to show that new residents are better able to bear the hardships of lower AFDC grants than others, the Statute would still be irrational because of its disparate treatment of new residents based on their previous states of residence. It is inconceivable that someone who previously lived in Mississippi can survive in California on hundreds of dollars less per month than someone who previously lived in New York City. Moreover, the Statute does not pay lower benefits to newcomers who previously lived in states with higher AFDC benefits than California's. Because California does not and cannot claim that former residents of those states somehow lack the resiliency and

resourcefulness that would allegedly allow other new residents to adjust to lower benefits, this distinction too is irrational.

Neither can a difference in reliance interests of new and longer term residents justify the classifications drawn by the Statute. In *Nordlinger v. Hahn*, 112 S.Ct. 2326 (1992), the Court held that a provision of the California Constitution which resulted in higher property taxes for new homeowners than for those who have remained in the same home over the years was rationally justified, among other reasons, by the fact that "a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner." *Nordlinger*, 112 S.Ct. at 2333.

Even assuming that current AFDC recipients have a reliance interest in their benefits that the State could protect, this is not what the California Statute does.[21] Protecting all longer term residents of the State from benefit cuts is not even a close approximation of protecting current recipients. There is not a static population of AFDC recipients who have "vested expectations" in their benefit levels similar to the reliance interest of the exiting homeowners in *Nordlinger*. *See* WLF Br. at 12.

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[21] Despite the argument made by amicus, California has not in recent years evidenced a concern about the reliance interests that some of its citizens may have in a particular level of AFDC benefits. In the same legislation that contained the multi-tier benefits scheme for new residents, California cut benefits to current AFDC recipients by 5.8%. Cal. Welf. & Inst. Code §§ 11450.01(a), 11450.01(b) (cutting benefits 4.5% in October 1992 and another 1.3% in December 1992). The State has in fact repeatedly cut AFDC benefit levels over the last four years. *See Overview*, *supra* at 375 (benefit for a family of three cut from $694 in 1991 to $663 in 1992 to $624 in 1993 to $607 in 1994).

To the contrary, turnover in the AFDC rolls is continuous and substantial. About 70% of families entering AFDC exit the program within twenty-four months or less according to recent studies of monthly caseload dynamics. *Overview*, *supra* at 441-42. In 1993, over 2.4 million cases were opened, and over 2.5 million were closed. HHS, Office of Family Assistance, *Quarterly Report on State-Reported Data on Aid to Families with Dependent Children*, 95, 98 (May 1994). In California, over 300,000 cases were opened and over 300,000 AFDC cases were closed in 1993. *Id.* Each year, therefore, many of those receiving the full California benefit under the Statute would be longer term Californians who had not previously received AFDC and who could not be considered to have any greater reliance interest in a particular AFDC grant level than newcomers who apply for AFDC.

2. The Growth In California's AFDC Caseload Has Not Been Caused By New Residents.

The irrationality of the Statute is further highlighted when one considers that new residents are not responsible for recent increases in California's caseload. Interstate migration could not have caused the increase in AFDC caseloads that was common to nearly all of the States. Rather, the AFDC caseload in California grew for the same reason it grew in forty-seven other States over the same period: the weakness of the national economy and changing demographic factors. *See* Statement of the Case, *supra* at p. 4. California has in fact witnessed a net *out*migration of poor people in recent years through interstate migration, according to a recent analysis of data from the 1990 census. That study concluded that between 1985 and 1990 almost 50,000 more poor people left California for other states than moved to California from other states. William H.

Frey, *Immigration and Internal Migration for U.S. States: 1990 Census Findings by Poverty Status and Race*, Population Studies Center, University of Michigan, Research Report No. 94-320 (September 1994).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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Respectfully submitted,

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APPENDIX

APPENDIX

Text of the Multi-Tier Durational Residency Statutes from Illinois, Iowa, and Wisconsin.

305 ILL. STAT. § 5/11-30 (1992):

Aid recipients from other states; limitations on amount of aid. Notwithstanding any other provision of this Code, if an applicant for aid under any Article of this Code has moved to this State from another state, and if the applicant received public aid in that other state under its laws that are equivalent to this Code at any time within the 12 months immediately preceding the date the applicant became a resident of this State, then during the first 12 months that the applicant resides in this State the applicant shall not be eligible to receive aid under any Article of this Code in an amount greater than the amount of comparable aid the applicant received under the laws of the state from which he or she moved to this State. The Illinois Department shall apply for all necessary federal waivers, and implementation of this Section is contingent on the Illinois Department receiving any necessary federal waivers.

IOWA S.F. 268 (1993):

...

5. If an individual received aid to dependent children in another state within one year of applying for assistance in this state the requirements of this subsection shall apply. Using the family size for which the individual's eligibility is

determined, the department shall compare the standard grant payment amount the individual would be paid in the other state with the standard grant payment amount the individual would be paid in this state. For the period of one year from the date of applying for assistance in this state, the individual's grant shall be the lesser of the two amounts. The provisions of this subsection shall not apply to an individual who was previously a resident of this state before living in another state and receiving aid to dependent children or to an individual who has moved to this state to be near the individual's parent or sibling.

WIS. STAT. § 49.19(11m):

(a) The Department shall apply to the secretary of the federal department of health and human services for approval of a demonstration project under which the department provides a person eligible for aid under this section who is described in par. (am) with monthly payments, for the first 6 months that he or she lives in the state, calculated on the basis of the aid to families with dependent children benefit level in the state in which the family most recently resided. The department shall promulgate a rule, which it shall update annually, establishing the aid to families with dependent children benefit that will be paid under the demonstration project according to family size and state of former residence. The department shall base the benefit for a family of the aid to families with dependent children benefit available to a typical family of the same size in the other state, taking into account all factors that may affect the amount of the benefit. The rule shall specify the factors that the department uses to establish the benefit for participants in the demonstration project. If a family moves from a state that allows a family to keep a different amount of income without losing

benefits than a family would be allowed to keep in this state, the department shall allow the family to keep a similar amount of income without reducing benefits.

(am) Under the demonstration project, a person is subject to receiving the payments under par. (a) if he or she has not previously resided in this state for 6 months and either:

1. Applies for benefits more than 90 days but fewer than 180 days after moving to this state and is unable to demonstrate to the satisfaction of the county department of social services that he or she was employed for at least 13 weeks after moving to this state; or

2. Applies for benefits within 90 days of moving to this state.

(b) If approval under par. (a) is granted and if the supreme court determines, within 9 months after the department notifies that attorney general that the approval has been granted, that the demonstration project does not violate either the state constitution or the U.S. constitution or the supreme court does not make a decision on the constitutionality of the demonstration project within that time, the department shall implement the project. The department may conduct the demonstration project for a period not to exceed 36 months. The department may not start the demonstration project before a computerized system for determining the amount of benefits payable to recipients under the demonstration project is complete.

(c) Subject to pars. (b) and (d), the department shall conduct the demonstration project in Kenosha county, Milwaukee county, Racine county, and up to 3 other counties. If the department does not initially select Rock county as one of the other counties and if one of the

counties specified in this paragraph or initially selected by the department enacts an ordinance or adopts a resolution under par. (d), the department shall give Rock county priority for consideration as a replacement county.

(d) The department may not conduct the demonstration project in a county if the county enacts an ordinance or adopts a resolution objecting to participating in the demonstration project.

(e) If the department conducts the demonstration project, the department shall enter into a contract with the legislative audit bureau under which the legislative audit bureau will contract with a private or public agency for the performance of an evaluation of the demonstration project, including whether the demonstration project deters persons from moving into this state, and will submit the evaluation of the demonstration project to the governor and to the chief clerk of each house of the legislature for distribution to the legislature under s.13.172(2).